

SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUSSEX COUNTY COURTHOUSE
GEORGETOWN, DE 19947

July 25, 2011

Ben R. Roten
SBI# 0052
James T. Vaughn Correctional Center
1181 Paddock Road
Smyrna, DE 19977

RE: *State of Delaware v. Ben Roten*, Def. ID# 0401005180

DATE SUBMITTED: June 1, 2011

Dear Mr. Roten:

Pending before the Court is a motion which defendant Ben Roten (“defendant”) has filed pursuant to Superior Court Criminal Rule 61 arguing that he is entitled to a vacation of his guilty plea on the ground that his double jeopardy rights have been violated. This is my decision denying the pending motion.

Defendant was arrested in January, 2004, on charges of kidnapping in the first degree; assault in the first degree in violation of 11 *Del. C.* § 613(a)(2);¹ aggravated menacing;² and

¹The charge of assault in the first degree- intentionally disfigure destroy amputate disable (Criminal Action No. 04-01-0385) read:

BEN ROTEN, on or about the 7th day of JANUARY, 2004, in the County of SUSSEX, State of Delaware, did intentionally disfigure - seriously-and-

refusing to authority to take photos and fingerprints.

The record³ shows the following. Defendant assaulted the victim, stopped several times,

permanently disable-permanently BILLIE DOWNES. To wit by fracturing the bones of her face.

The applicable statutory provision, 11 *Del. C.* § 613(a)(2), provided:

(a) A person is guilty of assault in the first degree when:

(2) The person intentionally disfigures another person seriously and permanently, or intentionally destroys, amputates or disables permanently a member or organ of another person's body.....

²The charge of aggravated menacing (Criminal Action No. 04-01-0386) read:

BEN ROTEN, on or about the 7th day of JANUARY, 2004, in the County of SUSSEX, State of Delaware, did by displaying what appears to be a deadly weapon, intentionally place BILLIE DOWNES in fear of imminent physical injury, to wit: STABBED AT HER WITH A KNIFE SAYING HE WOULD KILL HER.

The applicable statutory provision, 11 *Del. C.* §602(b), provided in pertinent part as follows:

A person is guilty of aggravated menacing when by displaying what appears to be a deadly weapon that person intentionally places another person in fear of imminent physical injury. Aggravated menacing is a class E felony.

As explained in *Graham v. State*, 846 A.2d 238, 2004 WL 557168, *3 (Del. March 19, 2004) (TABLE), regarding the charge of aggravated menacing:

The synopsis reflects the legislature's intent to elevate the misdemeanor crime of menacing to the felony crime of aggravated menacing if a defendant displays what appears to be a deadly weapon (even if it turns out not to be a deadly weapon).

³The portions of the record from which these facts are gathered are the affidavit of probable cause (located within Docket Entry No. 1) and Supplemental Police Reports, which defendant submitted as Exhibits to his first Motion for Postconviction Relief (Docket Entry No. 51).

and resumed assaulting her. The attacks began late on the evening of January 6, 2004, and continued into the early morning hours of January 7, 2004. He started assaulting her with his bare hands and after he had his arm around her neck, she lost consciousness. When she came to, he was still beating her. He stopped and he had a telephone conversation with his mother and told her he had just beat the victim severely. The victim attempted to leave and he told her he would kill her. He resumed beating her. The subsequent events are set forth in the affidavit of probable cause:

She thought he had fallen asleep at approx. 0400 hr. and left the trailer. He ran out after her with a folding knife. He grabbed her and with a slashing motion with the knife told her he would kill her if she tried to get away again. She was then dragged back into the trailer and beaten for awhile. During this time he made stabbing and slashing motions with the knife to the victim. He continued to tell her if she tried to leave he would kill her. She was unconscious until approx. 0730 hr.. She woke and Roten was sleeping so she left and went to her stepfathers [sic] house and the police were notified. ***

The trailer had blood splattered on the floor and cabinets. There was a black folding knife on a chest. There was what appeared to be a cookie jar smashed and glass was on the floor. Blood was on the bed the defendant was laying on and on his pants and sweater.

Nurse Covey of P.R.M.C. advised with permission from the victim that the victim has 2 fractured eye orbits, fractured nose and multiple skull fractures and bleeding on the brain.

Thus, twice the beatings stopped and resumed. The first time was when defendant stopped and talked with his mother on the telephone. The second time was when the victim thought the defendant had fallen asleep. Around 4:00 a.m., the victim attempted to escape and got outside. Defendant caught her, threatened to kill her while making a slashing motion with a

knife, dragged her back inside the residence, and beat her again. The beatings resulted in her losing consciousness and suffering a closed head injury; a brain contusion; multiple complex facial fractures, including a left maxillary sinus fracture, orbital fracture, zygomatic fracture, and nasal bone fractures. Defendant nearly beat her to death.⁴

In March, 2004, the Grand Jury indicted defendant on a number of charges, including attempted murder in the first degree (count 2) and aggravated menacing (count 3).⁵ On August 6, 2004, defendant pled guilty to the charge of assault in the first degree in violation of 11 *Del. C.* § 613(a)(3),⁶ a lesser included offense of the attempted murder in the first degree charge, and to the

⁴That is why, when the State of Delaware (“the State”) indicted him, it changed the charge of assault in the first degree (Criminal Action No. 04-01-0385) to attempted murder in the first degree. This count of the indictment alleged:

BEN ROTEN, on or about the 7th day of January, 2004, in the County of Sussex, State of Delaware, did attempt to intentionally cause the death of another person, Billie Downes, which act constituted a substantial step in a course of conduct planned to culminate in the commission of the act of Murder in the First Degree, in violation of Title 11, § 636(a)(1) of the Delaware Code, in violation of Title 11, § 531 of the Delaware Code.

⁵The aggravated menacing charge read:

BEN ROTEN, on or about the 7th day of January, 2004, in the County of Sussex, State of Delaware, did display what appeared to be a deadly weapon, a knife, and did intentionally place Billie Downes in fear of imminent physical injury, in violation of Title 11, § 602(b) of the Delaware Code.

⁶In 11 *Del. C.* § 613(a)(3), it is provided:

(a) A person is guilty of assault in the first degree when:

(3) The person recklessly engages in conduct which creates a substantial risk of death to another person, and thereby causes serious physical injury to another

charge of aggravated menacing.⁷

In order for an assault in the first degree to have been committed, defendant must have recklessly engaged in conduct which created a substantial risk of death to the victim and thereby caused serious physical injury to the victim. These elements were established after the first onslaught described above. Much later, after the beatings stopped, the victim fled and defendant used a knife to intimidate or regain control of her. Defendant admitted to using the knife when he pled guilty to the aggravated menacing charge, despite what he has otherwise contended since entering the plea. The guilty plea reflects defendant admitted his guilt to the separate events which occurred. By entering the plea, he gained the benefit of the bargain, as he was facing a penalty of life imprisonment.

On June 1, 2011, defendant filed his pending motion.⁸ He argues that his guilty plea is

person....

⁷The Court deemed his decision to be voluntary and a knowing and intelligent waiver of his rights. After entering the plea and before sentencing, defendant filed a motion to withdraw the plea. In its September 24, 2004, ruling on the motion to withdraw the guilty plea, the Court concluded that the plea was a voluntary choice and a knowing and intelligent waiver of his rights.

⁸Defendant has filed numerous motions between the time he was sentenced and the time he filed the pending motion. After being sentenced, defendant appealed the denial of his motion to withdraw his guilty plea. The Supreme Court affirmed the decision of this Court. *Roten v. State*, 884 A.2d 512, 2005 WL 2254202 (Del. Sept. 15, 2005) (TABLE). In February, 2006, defendant filed his first motion for postconviction relief. This Court ruled that all claims, other than the ineffective assistance of counsel claims, were procedurally barred and it then ruled that the ineffective assistance of counsel claims were meritless. *State v. Roten*, 2006 WL 1360513 (Del. Super. May 18, 2006). The Supreme Court affirmed this decision. *Roten v. State*, 922 A.2d 415, 2007 WL 773389 (Del. March 15, 2007) (TABLE). Defendant pursued his arguments in the United States District Court by way of a petition seeking a writ of *habeas corpus*. That court denied his claims for relief. *Roten v. Deloy*, 575 F. Supp.2d 597 (D. Del. 2008). Thereafter, defendant filed with this Court a motion for sentence reduction, which this Court denied as time-barred. The Supreme Court affirmed this denial. *Roten v. State*, 977 A.2d 899, 2009 WL 2185824 (Del. July 23, 2009) (TABLE).

invalid as a violation of his double jeopardy rights since aggravated menacing is a lesser-included offense of assault in the first degree.

Defendant is attempting to stand the law on its head. He could have tested the factual context of the State's case at trial and could have pursued a double jeopardy claim. However, he waived that right by entering into his plea agreement. Where a defendant has entered a plea agreement knowingly and voluntarily, that defendant has gained the benefit of the bargain of the plea and he has waived the right to pursue a double jeopardy claim pursuant to postconviction relief or pursuant to a motion to correct an illegal sentence. *Evans v. State*, 2011 WL 1758828, *2 (Del. May 9, 2011) (TABLE); *Benge v. State*, 945 A.2d 1099, 1101 (Del. 2008);⁹ *Hall v. State*, 937 A.2d 139, 2007 WL 3170467, *1 (Del. Oct. 30, 2007)(TABLE); *Bowers v. State*, 933 A.2d 1249, 2007 WL 2359553 (Del. Aug. 20, 2007) (TABLE).

Even if the Court ignored the well-established law which deems his double jeopardy claims to have been waived and if it considered defendant's arguments, the Court would conclude there clearly is no substantive merit to defendant's double jeopardy argument as it pertains to his sentencing. *Bowers v. State, supra*. As the Superior Court recently explained in *State v. Johns*, 2011 WL 2750749, *2 (Del. Super. July 12, 2011):

Pursuant to 11 *Del. C.* § 206(a), when “the same conduct may establish the commission of more than one offense, the defendant may be prosecuted for each offense,” unless one offense is included in the other, one offense consists only of an attempt to commit the other, or inconsistent findings of fact are required to

⁹This decision affirmed the Superior Court's decision in *State v. Benge*, 2007 WL 1520032 (Del. Super. May 2, 2007). Therein, the Superior Court noted that “[i]f a person can plead guilty to a charge that does not exist, *Downer v. State*, Del. Supr., 543 A.2d 309 (1988), he surely can waive his known constitutional rights pursuant to a plea.” *Id.* at *3.

establish the commission of the offenses.FN17 At the same time, the Double Jeopardy Clause protects a defendant from successive prosecutions, multiple charges under separate statutes, and being charged multiple times under the same statute.FN18 Thus, a single offense divided into multiple counts would violate the Delaware and U.S. Constitutional protections against Double Jeopardy.FN19

FN17. 11 *Del. C.* § 206(a).

FN18. *Sisson v. State*, 903 A.2d 288, 296 (Del.2006).

FN19. *Id.* The Delaware Constitution's prohibition on Double Jeopardy is effectively identical to that of the United States Constitution. *See* Del. Const. art. I, § 8 (“[N]o person shall be for the same offense twice put in jeopardy of life or limb.”).

Whether or not one offense may be included in another, for Double Jeopardy purposes, is governed by 11 *Del. C.* § 206(b), which provides that an offense can be merged if it: 1) is established by the proof of the same or less than all the facts required to establish the commission of the offense charged; 2) consists of an attempt to commit the offense charged or to commit an offense otherwise included therein; or 3) involves the same result but differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpability suffices to establish its commission.FN20

FN20. 11 *Del. C.* § 206(b).

This was not a situation where the defendant committed a single offense and was charged with multiple crimes for that one offense. Instead, as the record establishes, he committed separate and distinct crimes against the victim: he beat her; he stopped the beatings; he resumed the beatings and stopped; later, when he caught her after her escape, he threatened to kill her while exhibiting a knife; and thereafter, he took her back inside and resumed beating her. The assault in the first degree was a separate crime from the aggravated menacing and thus, separately punishable. *Bowers v. State, supra; State v. Johns, supra.* Defendant pled guilty to the separate crimes. There is no basis for his argument of a double jeopardy violation and this argument fails.

Bowers v. State, supra.

Thus, for the foregoing reasons, defendant's pending motion is denied.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Prothonotary's Office
Melanie C. Withers, DAG
James D. Nutter, Esquire